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Nos. 81-31, 81-228 and 81-455

IN THE

# Supreme Court of the United States

October Term, 1981

CALIFORNIA, et al., Appellants in No. 81-31

*v.*

GRACE BRETHREN CHURCH, et al.

UNITED STATES, et al., Appellants in No. 81-228

*v.*

GRACE BRETHREN CHURCH, et al.

GRACE BRETHREN CHURCH, et al., Cross-Appellants in No. 81-455

*v.*

UNITED STATES, et al.

On Appeals From the United States District Court for the Central District of California

## BRIEF FOR GRACE BRETHREN CHURCH, ET AL.

WILLIAM BENTLEY BALL
PHILIP J. MURREN
KATHLEEN A. O'MALLEY
BALL & SKELLY
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

ERIC NELSON LINDQUIST
ROBERT L. TOMS
LISA A. RUNQUIST
CALDWELL & TOMS
611 West Sixth Street
Los Angeles, CA 90017
(213) 628-1300

*Attorneys for Grace Brethren Church, et al. as Appellees in Nos. 81-31 and 81-228 and as Cross-Appellants in No. 81-455*

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

## QUESTIONS PRESENTED

1. Does the imposition, upon pervasively religious schools, of the federal-state unemployment tax program violate the non-entanglement limitations of the Establishment Clause of the First Amendment?

2. Does the Tax Injunction Act bar a district court from exercising jurisdiction in respect to a complaint which makes substantial claims under the Religion Clauses of the First Amendment challenging the imposition of a state tax, where a state's constitution and statutes prohibit initial resort to the state's courts but instead require the claimant to pursue protracted administrative proceedings in which constitutional issues are barred from consideration and which involve excessive entanglement of government with religion?

3. Does such imposition violate rights, protected by the Free Exercise Clause, of those schools, of teachers pursuing a religious vocation in such schools, and of parents whose children are enrolled therein?

4. Does imposition of the federal-state unemployment tax program upon pervasively religious schools which, though not operated by churches, are indistinguishable from them in religious character and mission, violate rights guaranteed such schools by the Equal Protection Clause of the Fourteenth Amendment?

## PARTIES

The parties in the court below were:

PLAINTIFFS

"Grace Brethren" case (No. CV 79-93 MRP):

Grace Brethren Church of Long Beach, California, and its pastor, Rev. David L. Hocking;

Calvary Cross Church of the Highlands of San Bruno, California, and its pastor, Rev. Donald B. Sheeley;

Scott Memorial Baptist Church of San Diego, California, and its pastor, Rev. Tim LaHaye;

Christian Unified Schools of San Diego, an incorporated association of five fundamentalist schools with a central office in El Cajon, California;

Redwood Christian Schools, an incorporated association of four fundamentalist schools with a central office in Castro Valley, California;

Sidney and Patricia Bowen of Compton, California, whose children attend Grace Christian Schools, an affiliate of plaintiff Grace Brethren Church;

Peter and Sue Farrelly of Pacifica, California, whose children attend Highlands Academy, an affiliate of plaintiff Calvary Cross Church of the Highlands;

William and Janet Tschantz of La Mesa, California, whose children attend plaintiff Christian Unified Schools of San Diego;

Arthur and Cheryl Brandwood of Hayward, California, whose children attend plaintiff Redwood Christian Schools;

Stanley Eddington of San Lorenzo, California, a teacher at plaintiff Redwood Christian Schools;

R. Florence Murti of Daly City, California, a teacher at Highlands Academy; and

R. Suzanne Royer of Long Beach, California, a teacher at Grace Christian Schools.

"Lutheran" case (No. CV 79-162 MRP):

The Lutheran Church-Missouri Synod;
St. John's Lutheran Church, a member of Lutheran Church-Missouri Synod and operator of a primary school at Orange, California;
Vivadell Keiser, a teacher at the school operated by St. John's Lutheran Church.

DEFENDANTS

"Grace Brethren" case (No. CV 79-93 MRP):

The State of California;
The California Employment Development Department;
The Director of the California Employment Development Department;
The United States of America;
The United States Department of Labor; and
The United States Secretary of Labor.

"Lutheran" case (No. CV 79-162 MRP):

The California Employment Development Department;
The Director of the California Employment Development Department;
The United States Secretary of Labor.

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Nos. 81-31, 81-228, 81-455

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-31

CALIFORNIA, ET AL.,

*Appellants*

*v.*

GRACE BRETHREN CHURCH, ET AL.

No. 81-228

UNITED STATES, ET AL.,

*Appellants*

*v.*

GRACE BRETHREN CHURCH, ET AL.

No. 81-455

GRACE BRETHREN CHURCH, ET AL.,

*Cross-Appellants*

*v.*

UNITED STATES, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

## BRIEF FOR GRACE BRETHREN CHURCH, ET AL.

## OPINIONS BELOW

The opinion of the district court filed September 21, 1979 (J. S. App. 1a-22a)[1] is unreported. The first supplemental opinion filed June 2, 1980 (J. S. App. 25a-34a), and the second supplemental opinion filed April 3, 1981 (J. S. App. 38a-86a), are likewise unreported.

## JURISDICTION

The judgment of the district court was entered on April 6, 1981 (J. S. App. 87a-90a). The federal parties filed notice of appeal to this Court on April 29, 1981 (J. S. 91a-92a). Justice Rehnquist extended until August 3, 1981, the time in which to docket the appeal (J. S. App. 93a). The federal parties invoked the Court's jurisdiction under 28 U. S. C. § 1252. The state parties filed notice of appeal to this Court on May 6, 1981 (State J. S. App. H, pp. 84-87; App. I, pp. 88-91). Grace Brethren Church, *et al.*, filed a cross-jurisdictional statement on September 1, 1981, under the second paragraph of 28 U. S. C. § 1252, having received notice of appeal by the federal parties that the latter had invoked the jurisdiction of this Court herein under that section. The church appeal was docketed on that date.

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1. Unless otherwise indicated, references to "J. S." and "J. S. App." are to the United States' Jurisdictional Statement and Appendix filed in No. 81-228.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

U. S. Constitution, Amendment XIV, Sec. 1:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

26 U. S. C. § 3309(b) (Federal Unemployment Tax Act):

> This section shall not apply to service performed—
>
> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

Cal. Unemp. Ins. Code § 634.5 (West Supp. 1981):

> With respect to * * * any nonprofit organization described by Section 608, "employment" does not include * * * service performed in any of the following:
>
> (a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

28 U. S. C. § 1252:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or

> order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

28 U. S. C. § 1341 (Tax Injunction Act):

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

## COUNTERSTATEMENT OF THE CASE

On January 8, 1979, Grace Brethren Church, along with other churches and their pastors, two groups of religious schools, parents of children attending these, and teachers in the schools, brought this action in the district court against the United States and the State of California.[2] Among the school plaintiffs were pervasively religious schools (Redwood Christian Schools) which are operated exclusively for religious purposes but are not operated, supervised, controlled, or primarily supported by, a church or convention or association of churches. The complaint, alleging lack of statutory authority and Religion Clause violation, challenged the imposition, upon the church-schools and the Redwood Christian Schools, of the Federal Unemployment Tax Act ("FUTA"), 26 U. S. C. § 3301 *et seq.*, and the corresponding California Unemployment Insurance Code. Both declaratory and injunctive relief were sought.

The federal defendants moved to dismiss the complaint on the ground that the district court, by virtue of the Tax Injunction Act, 28 U. S. C. § 1341, lacked subject matter jurisdiction. The district court, on September 21, 1979, held that employees of schools operated by churches or by churches through separate corporations were not covered, according to the plain meaning of the statutes. The court also held that it had subject matter jurisdiction, the Tax Injunction Act being inapplicable in the premises due to lack of an efficient remedy under California law, in that

2. A second litigation, *The Lutheran Church-Missouri Synod, et al. v. State of California Employment Development Department, et al.*, challenging, on statutory and constitutional grounds, application of the California Unemployment Insurance Code to schools operated by members of the Missouri Synod, had been consolidated for trial with the *Grace Brethren* action. The Lutheran schools in question were either without a separate legal existence from the churches by which they were operated or were operated as a separate corporation of a church or association of churches.

First Amendment rights would be violated by the state tax determination process (J. S. App. 16a-21a).

A trial ensued at which were heard numerous witnesses for the plaintiffs and witnesses for the United States.

Upon trial the defendant United States Department of Labor presented, as expert witnesses, two employees of the Department who testified at length with respect to the benefit determination process. (J. A. 103-188).[3] The witness Ernest L. Carter identified himself as "an unemployment insurance program specialist" who furnishes "technical assistance to the states interpreting federal law, federal requirements in unemployment insurance." (J. A. 104). The witness stated that he was involved in "determination of eligibility under state law regarding discharge [and] refusals of employment." (J. A. 104). Testifying that the unemployment insurance program is a "federal-state program", he stated that it was the job of his office "to ensure that the state agencies comply with the federal standards" with respect to benefit determinations. (J. A. 108). Counsel for the federal government questioned the witness as to how determinations are made where the employee of a religious school is discharged on religious or moral grounds. The federal government's second witness, Bernard Streett, Supervisor of the Appeals Unit for the Unemployment Insurance Service, Employment and Training Administration, U. S. Department of Labor, testified "as an expert on the issue of the federal standards for adjudication of claims in formal hearings before state unemployment insurance agencies." (J. A. 152). He stated that it is the function of his office "to monitor the nature of the hearing processes that take place in the states and how those processes function." (J. A. 151). His testimony then dealt extensively with the application of federal guidelines to cases (in the states) involving benefit determinations where employees of religious schools are discharged on religious or moral

3. "J. A." indicates reference to the Joint Appendix herein.

grounds. (J. A. 155-188). The State of California did not object to the questions propounded to these witnesses; nor did California offer any witnesses in order to present testimony to show that the benefit determination processes in California differ significantly from those contained in the federal guidelines, in particular in respect to cases involving employees discharged from religious schools.

The testimony of the government witnesses disclosed that:

(a) The state claims determination agency entertains and passes upon conflicting claims as to whether the employee of a religious body was discharged because of violation of that body's articles of faith. (J. A. 119-121, 134).

(b) The religious body which is the employer is made to bear the burden of proof that (a) the particular doctrine was part of an agreement between itself and the discharged employee and (b) that the employee breached that agreement. (J. A. 121).

(c) Where the religious body discharges the employee due to its judgment that the employee has shown a decline in religious fervor, the state agent must declare this not to be misconduct unless it has caused harm to the religious body, and the state is the judge of whether "harm" has in fact taken place. (J. A. 123-124).

(d) The agent of the state must become familiar with religious doctrine (J. A. 132) in order to be able to determine not merely whether there has occurred a violation of an express rule of the religious body, but also to determine the issue of whether there has occurred a violation of an implied rule of that body. (*Ibid.*)

(e) Within the state's jurisdiction to determine religious reasons for discharge is also jurisdiction to weigh and determine moral reasons for discharge. (J. A. 134).

(f) Whether or not an employee of a religious body, who was discharged on account of incompetence, was incompetent to communicate the doctrine of the religious body is a matter to be determined by the state (J. A. 135-136), and if this incompetence was not willful, it would not be construed as misconduct. (J. A. 136).

(g) The state determines whether the religious body need have given express warning to its employee, and whether that warning was reasonable or needed. (J. A. 139-140).

(h) The state determines whether a particular rule of the religious body is an important one. (J. A. 140-141).

(i) The state makes "a determination of the effect [of the employee's conduct] on the religion or the church". (J. A. 142).

(j) The state may determine whether a religious body is a church (J. A. 166-167), and whether a particular employee of that body is a minister. (J. A. 177).

(k) Where a religious body and its discharged employee dispute the reasonableness of the rule of the religious body which that body claims the employee violated, the state will determine the issue of reasonableness. (J. A. 167-169).

(l) In the case wherein there appears to have been a misunderstanding over whether a doctrinal point had been agreed upon by the religious body and its employee, the state must find in favor of the employee. (J. A. 170).

(m) Where the religious body and its employee disagree upon a point of doctrine, "that situation would lend itself to a decision in favor of the employee". (J. A. 173).

On April 6, 1981, the district court issued a permanent injunction enjoining the imposition of the Act. The court held that the imposition of the program on the church-schools (whether incorporated separately from a church or not) (a) is barred by the plain meaning of the federal act which exempts church employees, and (b) creates excessive church-state entanglements forbidden by the Establishment Clause due to "[i]nvolvement of state officials in the resolution of questions of religious doctrine in the course of determining the benefit eligibility of discharged employees of religious schools." (J. S. App. 88a). The court also held that the application of the Act to the non-church religious schools (Redwood Christian Schools) would be "incompatible with the Religion Clauses of the First Amendment because it results in excessive entanglement of the state with religion." (J. S. App. 89a). The court also held that no violation of the Free Exercise Clause arose as to any of the schools (J. S. App. 58a-66a).

The federal parties filed notice of appeal to the Supreme Court on April 29, 1981; the state parties field notice of appeal on May 6, 1981. Grace Brethren Church, *et al.*, filed a cross-jurisdictional statement on September 1, 1981.[4] This Court on November 2, 1981, postponed further consideration of its jurisdiction to the hearing of the cases (consolidated) on the merits.

4. Neither governmental party challenges the conclusion of the district court that separately incorporated church-schools are exempt under the statutory scheme. This case therefore pertains solely to non-church religious schools.

## SUMMARY OF ARGUMENT

This case concerns the imposition of the federal-state unemployment tax program upon pervasively religious schools which, though not church-affiliated, are indistinguishable in religious mission from schools which are.

The district court was correct in holding that the imposition of the program upon non-church religious educational ministries violates the non-entanglement requirements of the Establishment Clause. Extensive evidence adduced upon trial shows that the benefit eligibility determination process readily involves the state in the resolution of religious issues where employees of religious institutions are discharged for "misconduct" or terminate employment for "good cause". Further, the application of the California Unemployment Insurance Code itself to religious schools involves sustained and detailed relationships between government and religious bodies of a kind condemned by this Court as excessively entangling.

The Tax Injunction Act did not deprive the district court of subject matter jurisdiction, the California Constitution and the California Unemployment Insurance Code operating to render unavailable to the schools any "plain, speedy and efficient" remedy in the courts of the state. Further, a religious body, if left to its remedies under California law, would be forced to suffer substantial constitutional damage.

Imposition of the program would violate free exercise rights of the religious ministries in question by imposing a tax directly on religious activity which burdens that activity. The program lends itself to governmental conditioning of the employment relationship within religious institutions, and burdens teachers in the schools, and parents of children enrolled therein, in the exercise of religious liberties. No compelling governmental interest has been shown to justify the imposing of these burdens upon religious freedom.

To impose the program upon the non-church-affiliated religious schools here involved, while exempting church-affiliated schools, would constitute arbitrary discrimination against the former, violative of the requirements of equal protection.

## ARGUMENT

### I. Imposition of the Federal-State Unemployment Tax Program on Pervasively Religious Schools Violates the Non-Entanglement Limitations of the Establishment Clause.

The district court, based on the evidence presented, found:

> "The church-affiliated and non-church-affiliated schools in the two cases are virtually indistinguishable in religious mission. The overriding purpose of all the schools is to instill religious values and beliefs in young people. In each school, an attempt is made to create an environment in which religion is pervasive. An effort is made to teach all subjects, including those traditionally regarded as secular, from a religious perspective, and religion permeates extracurricular activities as well." (J. S. App. 75a).

The court held, therefore, that the non-church religious schools are entitled to the same First Amendment protection against imposition of the Unemployment Tax Act as the church-schools. The conclusion of the court is patently correct.

The governmental parties principally contend that the district court erred in its holding that the imposition of the unemployment compensation tax scheme upon the non-church schools would violate the Establishment Clause. In two respects that contention is incorrect. First, the benefit eligibility determination process gives rise to excessive entanglement between government and religious ministries. Second, the administrative processes required by the California Unemployment Insurance Code, if applied to such ministries, would constitute sustained and detailed administrative relationships similarly offensive to Establishment Clause principle.

**A. Entanglement in the Benefit Eligibility Determination Process**

Under § 3304(a)(10) of the Federal Unemployment Tax Act and § 1256 of the California Unemployment Insurance Code, an employee subject to the unemployment compensation scheme is disqualified from receiving benefits to which he would be otherwise entitled if he is discharged for "misconduct". § 1256 of the California Unemployment Insurance Code also disqualifies those employees who leave work "voluntarily without good cause". Determination of whether a discharge is for misconduct, or whether a voluntary termination is for "good cause", is a function of the state officer who administers the unemployment compensation program. The district court correctly held that, in the benefit determination proceedings, state officers "would be called upon to resolve questions of religious doctrine . . . , thus entangling the state with religion in a constitutionally impermissible manner." (J. S. App. 68a).

A critically important group of employees in the religious schools is its teachers. This Court, in *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 502 (1979) addressed the matter of government inquiry into teacher dismissals in such schools as follows:

> "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the *very process of inquiry* leading to findings and conclusions." (Emphasis supplied).

This entangling and chilling process results from involvement of government in a "church-teacher relationship in a church-operated school [which] differs from the employment relationship in a public or other non-religious school." *Id.* at 504.

Teachers play a "key role", *Catholic Bishop, supra*, at 501, in the mission of the religious school. That mission, in respect to the Redwood Christian schools, embraces at least

the following areas: curriculum (J. A. 85, 87, 88); pervasiveness of Bible-centered religion in the life of the school (J. A. 85, 87); textbooks (T. 24-27, 28, 29);[5] discipline (J. A. 85-87); dress (J. A. 87); moral conduct of faculty and students (J. A. 93, 96); religious character and religious witness of teachers (J. A. 89-91); religious atmosphere (J. A. 86); the faculty as a community of faith (J. A. 92); control of teaching and school life from point of view of faith and morals (J. A. 93); religious holidays and character of religious observances (J. A. 85-86). Employees other than teachers are also fully a part of the schools' religious ministry. (J. A. 89).

With respect to each of these sensitive areas, it is possible that cause may arise which will warrant dismissal, on religious grounds, of an employee, or will give rise to a dispute which an employee may claim is "good cause" for leaving. In either event, following a claim for unemployment compensation, the secular authority (in the form of the hearing examiner) would be called upon to rule upon whether the voluntary termination was for good cause, or upon whether the conduct of the employee constituted misconduct. As has been seen (see Counterstatement of the Case, *supra* at 7-8), this determination readily involves the state in the determination of religious issues.[6]

The post-termination processes are, of course, a necessary working part of the unemployment compensation program. If there is no allowance to the employer for misconduct situations, then every discharge is compensable. If such allowance is made, then the state *is* obligated to

5. "T." indicates reference to the Transcript of Proceedings before the Hon. Mariana R. Pfaelzer on August 12-13, 1980.

6. Although these pervasively religious schools maintain a conscientious opposition to the practice of abortion and extra-marital sex, the Federal Unemployment Tax Act forbids a state to deny an award of benefits "on the basis of pregnancy or termination of pregnancy". 26 U. S. C. § 3304(a)(12). Thus a school employee dismissed for pregnancy out of wedlock or for procuring an abortion would be paid benefits at the expense of the school.

determine the existence, or not, of misconduct. But in the application of the Act to religious organisms, the terms "misconduct" and "good cause" are necessarily weighted with a range of religious and moral matters, and if anything is clear under the Constitution, it is that government may have "*no role*" in passing upon such matters.

Also, however, is the potential effect upon *present* employees of the exercise by government of that forbidden role. In *Catholic Bishop of Chicago, supra*, this Court pointed to the effect of the very presence of NLRB jurisdiction over the religious schools there considered:

> " 'The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools'." *Id.* at 496.

The governmental parties are tardy in attempting to improve, from their point of view, the trial record. The unemployment compensation program is a federally controlled program.[7] Upon the trial the federal government presented expert testimony to show how the Department of Labor considers the benefit determination process to work in all fifty states and how the Department furnishes training to state unemployment compensation officers in the requirements of federal law—and in particular with respect to the benefit determination process. (J. A. 103-188).

The State did not object to the introduction of this testimony. With full opportunity to do so, it presented no evidence whatever to show that California conducts

7. The United States Secretary of Labor is required to approve the law of any state participating in it, 26 U. S. C. § 3304(a), and each year he must certify to the Secretary of the Treasury each state whose law he has previously approved, 26 U. S. C. § 3304(c), and can decertify any state which has failed to comply with certification requirements. 26 U. S. C. § 3304(c), (d). Credit against the federal tax imposed by the Federal Unemployment Tax Act, for contributions made to state unemployment compensation funds, is dependent upon the aforementioned federal certification. 26 U. S. C. § 3302(a).

the benefit determination process outside the federal guidelines and in ways which can involve no forbidden entanglements. The State complains that the federal expert witnesses had never *personally* conducted a benefit eligibility hearing involving a church employee. But the State, upon the trial, never raised a question as to the relevance, expertise or competency of the testimony of those witnesses.

The district court most justifiably relied in part upon the federal experts' testimony. (J. S. App. 67a-69a). But it based its conclusion respecting entanglement *also* upon what it regarded as the "*inevitable*" effect of the operation of the statute.[8] So far, therefore, as the State complains that the record evidence does not support the district court's conclusion, it raises a matter of no substance whatsoever.

The State, in this part of its argument, also seeks to make it appear that the religious parties have challenged solely the "tax side" of the program (imposition of the unemployment insurance tax) and not the "award of benefits" side (determination of benefits eligibility). The State then argues that the former "side" should be considered independently of the latter "side"; hence, so they say, the Court should disregard the potential constitutional questions which benefit determination proceedings might pose where religious school employees are involved. (California Amended Brief, 18-21). The complaint, however, challenged the imposition of the statute upon the religious entities *in its every aspect*, and specifically with respect to the benefit determination process. (J. A. 25). The district court recognized that and likewise properly

8. See, *e.g.*, decision of Oakland Office of Appeals affirming decision of Administrative Law Judge that an employee of Redwood Christian Schools, discharged for misconduct for not attending church regularly, was eligible for benefits, the decision being based upon the *agency's* determination that attending church "regularly" could mean less than weekly and at any church of the employee's choice. Supplemental Declaration of August C. Enderlin, filed December 17, 1980.

dealt with both "sides" of the statute. This argument of the State plainly raises no question of substance.

The governmental parties both argue that no excessive entanglements are necessitated in the statutory benefit eligibility determination process because whether an employee was discharged for misconduct would depend simply upon whether he or she knowingly failed to abide by an "established work rule" (which could incorporate religious requirements). The inquiry in such case would be "purely secular" (What was the "work rule" and was it knowingly violated?). The church property cases (*Jones v. Wolf*, 443 U. S. 595 (1979), etc.) so the State argues, permit precisely that kind of inquiry. (California Amended Brief, 22-24).

The attempt to reduce to a "work rule" the requirements of religious faith (in the setting of an employment by a religious ministry) calls for a vast oversimplification of factors involved.[9] The district court, however, noted

9. In footnote 13 of the State's brief (page 21), the State points to Title 22 of the California Administrative Code, Section 1256-36 (b)(1), which lists a series of situations in which an employee is *not* required to comply with a "work rule" regardless of its terms. The prospect of these situations but broadens the vista of unconstitutional entanglements necessarily presented by the application of the statute to religious ministries. For example, under Situation 2, in the footnote, the employee's noncompliance with the "work rule" would be based on its imposing "a new and unreasonable burden upon the employee." If that burden consisted of a religious duty, the state would determine whether that religious duty was an "unreasonable" burden. Similar potential entanglements are found in Situations 3, 5 and 6. In the hope of avoiding the entanglement issue, the appellants are careful to state that "the context in which an employee is not required to comply with a work rule under the above regulation is determined solely according to secular standards." This makes the effect even worse constitutionally: if the religious ministry insists that the "work rule" is not unreasonable because it is religiously required, the state may not hear of that: it must apply solely "secular standards"—thus effectively wiping out the religious claim.

that "not all doctrinally-based 'implied work rules' can be prescribed in advance; nor can religious ideals like 'fervor', which may be satisfied or breached by infinitely varied patterns of conduct, be precisely defined". (J. S. App. 70a). Further, the court examined the State's argument that only if the employees knowingly violate the religious "work rule", could there be found just cause for discharge (California Amended Brief, 21-25) and correctly concluded that "the adoption of a rule making the employee's subjective understanding of his employment terms decisive would embroil the hearing examiner in credibility questions which can only be resolved by involvement in religious issues". (J. S. App. 70a-71a).

The State correctly notes that "the mere potential" for excessive entanglement is sufficient to offend the First Amendment. *Meek v. Pittenger*, 421 U. S. 349, 371-372 (1975); *Lemon v. Kurtzman*, 403 U. S. 602, 619-620 (1971); *Catholic Bishop of Chicago v. NLRB*, 559 F. 2d 1112, 1126 (7th Cir. 1977), *aff'd.* 440 U. S. 490, 502 (1979); *Public Funds For Public Schools v. Marburger*, 358 F. Supp. 29, 41 (D. N. J. 1973), *aff'd.* 417 U. S. 961 (1974). It cannot be doubted that the thirteen examples of possible entanglement shown upon trial to be potential in the benefit eligibility determination process (see Counterstatement of the Case, *supra*, 7-8) are "excessive". The government parties choose to ignore what the government witnesses said. The United States suggests that cases such as *Yoder*[10] and *Ballard*[11] would allow the state to make the eligibility adjudications, though these would necessarily involve "some limited inquiry into religious matters." (Brief for the United States, 27, fn. 20). Obviously neither *Yoder* nor *Ballard* lend the slightest support for the legitimacy of processes which have lively potential for entanglements such as the thirteen which the record reveals. The State takes a different tack and asserts that this Court's church

10. *Wisconsin v. Yoder*, 406 U. S. 205 (1972).

11. *United States v. Ballard*, 322 U. S. 78 (1944).

property decisions (*e.g., Jones v. Wolf*, 443 U. S. 595 (1979)) may be read to mean that the state's adjudication of a religiously based "work rule" would somehow fall within the "neutral principles" analysis of those cases. What the State ignores, however, is what is of the essence of that whole line of cases from *Watson v. Jones*[12] forward—namely, that First Amendment values are plainly jeopardized when governmental proceedings are made to turn on the resolution by the state "of controversies over religious doctrine and practices". *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449 (1969).

### B. Entanglement in the Administrative Processes Required by the Code

The California Unemployment Insurance Code, if here applied, would impose on religious schools extremely extensive and complicated registration, record-keeping, reporting and informational requirements. (See California Unemployment Insurance Code, §§ 1085, 1086, 1088(a), 1088(b), 1092, 2105 and 2108, all of these being accompanied by criminal penalties.) Section 1089, if here applied, would require a religious school to post printed statements concerning benefit rights of employees within its ministry "and other matters as may be prescribed by authorized regulations".

The California Employment Development Department would be empowered to:

> (a) make investigations to determine whether a religious school, or employee thereof, is covered by the Code. See Section 1953 and *Hill v. Brisbane*, 66 Cal. App. 2d 15, 151 P. 2d 518 (1944);
>
> (b) issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records of religious institutions (Section 1953);

12. 80 U. S. (13 Wall.) 679 (1871).

(c) make an assessment, including a penalty of 10%, upon a religious school which fails to make returns, and to do so on the basis of an estimate arrived at according to whatever information may be in the Department's hands (Section 1126);

(d) assess a penalty of 25% on administrators of religious schools who, as a matter of religious conscience, willfully fail to comply with the requirement to file returns (Section 1128);

(e) obtain imposition of a lien on all religious property for failure to pay contributions (Section 1703);

(f) charge administrators or others who are responsible for religious affairs with personal liability for amounts of contributions due (Section 1735);

(g) obtain a summary judgment against a religious school for failure to pay contributions (Section 1815); and

(h) bring legal actions, in the courts of California or the United States, against religious schools and administrators to collect the amount of any delinquent employer or worker contributions, together with penalties and interest (Section 1852).

All of this is excessive entanglement between government and religion as well as an unjustifiable burden upon free religious choice. *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Catholic Bishop of Chicago v. NLRB, supra; Surinach v. Pesquera des Busquets*, 604 F. 2d 73 (1st Cir. 1979).

The religious schools are therefore required to march to orders of the government through the course of the investigatory phases of administrative action and conform their practices to government demands. After they have been burdened by investigatory, accounting and reporting requirements they must take their funds—funds held as a religious trust for their members—and apply those funds to secular governmental purposes. Only at this

point may a hearing be sought, but this is to be an administrative hearing, before a referee, and cannot touch matters of the constitutionality of the Federal Unemployment Tax Act under the Religion Clauses of the First Amendment. See *Buckeye Industries v. Secretary of Labor*, 587 F. 2d 231 (5th Cir. 1979). The referee's decision is then brought before an Appeals Board for review. The Appeals Board consists of five members, not more than two of whom need even be attorneys. (Code Section 401). This Board likewise may not judge the constitutionality of the Federal Unemployment Tax Act (and cannot be expected to reflect any expertise in the area of First Amendment liberties). Only after this administrative process has been exhausted may a religious body have access to the California state courts, and then only by means of claim for refund of amounts of money already paid.

This Court has frequently spoken a condemnation of "excessive entanglements" between church and state.

In *Walz v. Tax Commission*, 397 U. S. 664 (1970), the Court warned against governmental involvements with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The Court warned against policies which can lead to "confrontations and conflicts" between government and churches. *Id.* at 674.

In *Lemon v. Kurtzman, supra*, the Court described as a "classic warning" Mr. Justice Harlan's separate opinion in *Walz* wherein he spoke of "programs, whose very nature is apt to entangle the state in details of administration." *Id.* at 615. The Court also warned against "sustained and detailed administrative relationships (between government and these schools) for enforcement of statutory or administrative standards." *Id.* at 621.

This Court also noted that, with respect to the grants to colleges upheld in *Tilton v. Richardson*, 403 U. S. 672 (1971), there were no entanglements:

> "There are no continuing financial relationships or dependencies, no annual audits, and no government

analysis of an institution's expenditures on secular as distinguished from religious activities." *Id.* at 688.[13]

The Court, in *Walz*, indicated that the processes of taxation of church activity (*i.e.*, tax valuation, tax liens, tax foreclosures, "and the direct confrontations and conflicts that follow in the train of those legal processes", *Walz, supra,* at 674) constitute, without more, entanglements between government and religion.

At the outset of the administrative relationship, embodied in unemployment tax coverage, the State must audit the financial records of the school.

The school is then required, on a regular basis, to make reports to the State concerning liability for contributions, and is also required to keep its books open for inspection by State auditors. The school will also have to post government notices on its premises regarding unemployment compensation, thus being made the instrument of the State in disseminating information to persons who are performing religious functions. This information may also be such as to encourage fractionalization of the school faith community.

Many other administrative commands must be obeyed, and limitless inspections and evaluations of religious matters permitted, most under criminal penalty for non-compliance. These burdens and encroachments on religious autonomy are not, as the United States contends, "innocuous". (Brief for United States, 25). They are, instead serious and unwanted impositions of government oversight upon religious bodies.

This type of entanglement, when coupled with the inhibitive element of coerced State extraction of funds intended for religious use, is "excessive entanglement" and

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13. Similar inspection was enjoined in *Surinach v. Pesquera des Busquets,* 604 F. 2d 73 (1st Cir. 1979), on the basis of its entangling nature.

impermissible by virtue of the Establishment Clause of the First Amendment.[14]

## II. The Tax Injunction Act Did Not Deprive the District Court of Jurisdiction Over This Case.[15]

From the foregoing it is clear that the district court was correct in its statement that "facts of this case justify the issuance of an injunction" (J. S. App. 17a). And see *Public Funds For Public Schools v. Marburger*, 358 F. Supp. 29, 43 (D. N. J. 1973), *aff'd.* 417 U. S. 961 (1974). But it is also true, as the district court stated, that "this remedy is not available in the state court". (*Ibid.*)

While the United States argues that the Tax Injunction Act (26 U. S. C. § 1341) barred the jurisdiction of the district court to issue an injunction, it nonetheless urges that this case be decided, not on that issue, but on the merits of the constitutional issues. (Brief For United States, 21).[16] The State of California argues that the

14. *Committee For Public Education v. Regan*, 444 U. S. 646 (1980), cited by the United States, is not in point. *Regan* involved a state program of reimbursement to schools for the performance of certain secular functions. Participation by the schools in the program was entirely voluntary. Separate accounts, relating solely to reimbursable costs, were to be kept and subject to state audit. This voluntary, discrete program is in no way analogous to a state-compelled tax scheme which authorizes audit of even those expenditures relating solely to religious activities.

15. The religious parties make no contention that the Supreme Court lacks jurisdiction over this direct appeal. Hence that point is not briefed.

16. The Government, early in the litigation, had moved to dismiss on the ground that the Tax Injunction Act deprived the district court of jurisdiction. That court's preliminary injunction and opinion of September 21, 1979, denied that motion, and the Government then timely appealed to the Ninth Circuit which, on July 24, 1980, dismissed the appeal (following a stipulation by all parties for dismissal). While the present appeal insofar as it pertains to the non-church-operated schools, is timely, in that the district court issued an injunction protecting them only on April 6, 1981, it is questionable

United States is in error in its contention respecting the Tax Injunction Act, in that (a) the religious plaintiffs could not have obtained complete relief without its joinder and (b) the United States could not be compelled to submit to state court jurisdiction; hence the religious plaintiffs would not have had a plain, speedy or efficient remedy in the California courts. California, too, seeks disposition on the merits. (California Amended Brief, 35).

The religious parties agree with both governmental parties that the case should be decided on the merits, but for two reasons disagree with the assertion of the United States that the Tax Injunction Act deprived the district court of subject matter jurisdiction: (a) The state court remedy, if not absolutely barred by state law, is at best uncertain rather than "plain"; (b) The availability of the state court remedy is conditioned upon the involvement of pervasively religious ministries in excessively entangling processes of governmental inquiry.

### A. Non-Existence of State Court Remedy

The Constitution of the State of California, Article XIII, section 32, provides:

> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of *any tax*." (Emphasis supplied)[17]

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16. (Cont'd.)

whether the appeal, insofar as it pertains to the Tax Injunction Act, should be regarded as timely. If not, it should, in that respect, be dismissed.

17. The United States contends that a similar, but prior, version of this provision was not applicable to unemployment taxes. (Brief For United States, 20 n. 13). This is correct, but completely inapposite. The prior provision had application only to taxes levied under former Article XIII of the California Constitution, but the present provision clearly applies to "any tax."

Additionally, the California Unemployment Insurance Code, § 1851 provides:

> "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division."

While the district court, citing some California decisions dating from 1914 to 1942 (which it called "neither compelling nor recent" authority) was willing to conclude that "the availability of injunctive relief in State court is, at best, uncertain" (J. S. App. 17a), it would be more precise to say that that availability is absolutely barred by the California Constitution and the California statute, whose plain terms admit of no exceptions.[18] But even if the remedy in California is "at best uncertain", "[u]ncertainty concerning a State's remedy may make it less 'plain' under 28 U. S. C. § 1341." *Tully v. Griffin, Inc.*, 429 U. S. 68, 76 (1976). This Court most recently reiterated this point in *Rosewell v. LaSalle National Bank*, 450 U. S. 503, 517 (1981).

### B. The California Procedure Is Constitutionally Defective.

While the United States relies principally upon *Rosewell, supra*, that case does not bar injunctive relief under the circumstances here present. Even if *Rosewell* were to be read as broadly as the United States asserts, it is clear

18. Several constitutional challenges to these California anti-injunction provisions have been raised, but all have met with decisive unreceptiveness in the California courts. See *Lorco Properties, Inc. v. Department of Benefit Payments*, 57 C. A. 3d 809, 129 Cal. Rptr. 312 (1976); *Pacific Gas & Electric Co. v. State Board of Equalization*, 27 Cal. 3d 282, 165 Cal. Rptr. 122 (1980). In the latter case, the California Supreme Court held that even an allegation that being barred from injunctive relief rendered the remedy under the taxing act constitutionally "inadequate" could not overcome the bar.

that the California procedural criteria do not plainly, speedily or efficiently relieve religious bodies from constitutional harm.

The religious plaintiffs below presented First Amendment claims obviously calling for prompt disposition by a body competent to adjudge those claims. Section 3.5 of Article III of the California Constitution provides:

> "An administrative agency . . . has no power . . . (b) to declare a statute unconstitutional."

The plaintiffs, if forced to pursue their pressing claims via administrative agencies, would have been detoured into a briarpatch of entanglements between government and religion. That detour would not have been "plain, speedy and efficient" but complicated, slow, inefficient and—to religious bodies which accept no public aid and have but modest means through voluntary contributions of the faithful—inordinately expensive.

The "remedy" which appellees would have been forced to pursue, if turned away from federal court under Section 1341, would have been no remedy at all. For to force religious persons to entangle themselves with government, in the form of the full range of California administrative regulation, investigation and adjudication, is precisely the kind of constitutional damage which appellees had sought to avoid by instituting this action. This administrative relationship between government and religion, touching sensitive areas of religious concern central to the religious mission of these religious organizations, is here a source of harm to fundamental liberties. This administrative relationship is scarcely the remedy for the harm it inflicts. Again, it is to be noted that this Court has recognized:

> "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the *very process of inquiry* leading to findings and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 502 (1979) (Emphasis supplied).

The California Unemployment Insurance Code, as has been seen, would impose on religious schools extremely extensive and complicated registration, record-keeping, reporting and informational requirements, as well as subjecting them to audits, investigations and adjudications of matters touching upon religious doctrine, practice and morality.

Religious schools thus face the choice of either obeying religious conscience by refusing to permit the government to intrude upon their religious mission (and thereby subjecting themselves to personal loss, to the diverting of funds intended for religious uses, and bringing on financial hardship), or foregoing the exercise of religious conscience (under government edict) by complying with the unemployment insurance procedural requirements. *Sherbert v. Verner*, 374 U. S. 398, 404 (1963); *Thomas v. Review Board*, 450 U. S. 707, 717 (1981). Their religious liberties, under the prescribed procedure, would be at least temporarily suspended by government. But liberties suspended are liberties lost, and where fundamental liberties are in jeopardy of being lost, this Court has held that the lesser government concerns with administrative convenience must give way. Thus, where challenge is raised not merely to possible final outcome of an administrative procedure, but rather to the constitutionality of the procedure itself, a federal court need not stand by until the damage has been done, *Public Utilities Commission of California v. United States*, 355 U. S. 534, 539 (1958); *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324, 330 (1969); *Weinberger v. Salfi*, 422 U. S. 749, 765 (1975); *Matthews v. Diaz*, 426 U. S. 67, 73 (1976); *Califano v. Sanders*, 430 U. S. 99, 109 (1977); *Moore v. City of East Cleveland*, 431 U. S. 494 (1977), Burger, J. dissenting at 528, n. 3; and *Oestereich v. Selective Service Board*, 393 U. S. 233, 241 (1968), Harlan, J., concurring.

While this Court has held that § 1341 will not bar federal jurisdiction where the presence of an adequate state remedy is "uncertain", *Spector Motor Service v. McLaugh-*

*lin*, 323 U. S. 101 (1944), *Township of Hillsborough v. Cromwell*, 326 U. S. 620 (1946), it has most recently pointed out that "A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue *except in cases where an asserted federal right might otherwise be lost*". *Tully v. Griffin, Inc.*, 428 U. S. 68, 73 (1976). (Emphasis supplied). It is difficult to imagine a situation where it is more "certain" that fundamental rights would be lost without federal intervention than that presented by the instant case. Even in the pure property right situation involved in *Tully*, the Supreme Court was concerned over whether New York law permitted preliminary court relief to persons facing a sales tax assessment. As already demonstrated herein, Section 1851 of the California Unemployment Insurance Code and Article XIII, Section 32, of the California Constitution prohibit all such court relief.

Nothing stated in *Rosewell* in any way derogates from this Court's prior insistence that fundamental freedoms are not to be denied for the sake of administrative regularity. The California procedure, inasmuch as it does not respect the proper spheres of religion and state as decreed by the Religion Clauses, is itself unconstitutional when applied to religious bodies.

The district court, on well established grounds, was thus correct in holding that the Tax Injunction Act did not deprive the court of jurisdiction.

## III. Imposition of the Federal-State Unemployment Tax Program on Pervasively Religious Schools Violates Free Exercise Rights of Those Schools, of Teachers Pursuing a Religious Vocation Therein, and of Parents Whose Children Are Enrolled Therein.

The complaint sets forth seven ways in which Free Exercise rights would here be violated through imposition of the Unemployment Tax Act.[19] The district court spe-

19. (a) It imposes a tax and other financial burdens upon purely religious activity; (b) it imposes burdens of accounting and

cifically dealt with but one of these—namely, the taxing of a ministry. The threefold basis for the district court's conclusion that no Free Exercise violation results from such taxation is: (a) the tax is "indirect"—*i.e.*, it is not directly on a religious activity, (b) the tax is an "insufficient burden" on religious freedom to justify holding it unconstitutional, (c) a compelling state interest justifies imposing the tax. To the contrary, it is clear that:

**A. The Tax Affects Religious Activity.**

If the tax in question does not directly weigh upon religious activity, then no constitutional issue is posed by it. The court below stated two reasons that the tax should not be held to directly affect religious activity: It "is collected from religious institutions, not from individual religious believers". (J. S. App. 62a). Second, the tax "is imposed upon the employment relationship and not upon

19. (Cont'd.)

reporting upon religious ministries; (c) it reaches into churches and places under an unsolicited government program of employee benefits, church employees who are engaged in carrying out a religious ministry; (d) it burdens and endangers the ability of parents to choose a religious education for their children; (e) it burdens and endangers the opportunity of religious teachers to carry out their religious vocation in the Christian formation and education of young people; (f) it burdens and endangers pastors of churches and religious administrators of religious schools in the exercise of their religious ministry in education; (g) under familiar principles of unemployment compensation law, and under the laws of California, an award of unemployment compensation may depend upon a determination having been made by a governmental entity of whether there was termination of employment for "just cause". Termination of employment from a religious entity, however, may in given instances be on religious (including moral) grounds. Yet a governmental agency rendering the "just cause" determination may not base its determination upon religious principles but solely upon secular standards. Thus the religious ministries may be required to pay unemployment compensation where dismissal was based upon religious grounds.

individual religious acts". *Ibid.* Neither point is correct, though each is of high constitutional significance in the premises. Obviously, the fact that a tax is collected from religious institutions, and not from individual religious believers, does not relieve the tax of any possible unconstitutional feature; indeed, a tax on some religious institutions may be tantamount to a tax on individual religious believers, or on religious activity itself. The court was plainly incorrect in the conclusion at which it arrived in the following key statement:

> "It is true that individual teachers and administrators may view their work as a religious calling and that the primary purpose of religious schools is to inculcate religious doctrine. It is also true that administrators of religious schools may hire or terminate employees on religious grounds. However, none of the foregoing facts transforms the hiring or firing of a teacher, or the payment of his salary, from a secular to a religious act analogous to preaching. To hold otherwise would be to adopt the view that any thing or activity remotely connected to the exercise of religion or to those who engage in it is constitutionally immunized from taxation." (J. S. App. 12a).

The trial record, however, discloses that the employment relationship, in the schools here involved, is *completely* religious, and that no valid separation can be made between (a) the pervasively religious entity which is the school, (b) the teacher pursuing a religious vocation within that entity, and (c) those bonds of discipline, communication, interaction and common discipleship between the two which constitute the employment relationship (J. A. 89-90). Teachers in the Christian schools are hired for religious reasons; in most cases firing would also be for such reasons, whether related directly to doctrine, to morality, to level of fervor or to classroom proficiency—even the last-mentioned being considered part of the duty of faithful witness (J. A. 90-91). The views of the district

court on this point are a throwback to assumptions advanced by Pennsylvania and Rhode Island in the *Lemon-DiCenso* litigations[20]—namely, that the religious schools there considered could be viewed as being composed of various "religious" and (discrete) "secular" components. This view the Supreme Court rejected seeing, instead, that such schools are unitary organisms, pervasively religious and incapable of a religious-secular bifurcation. *Lemon v. Kurtzman, supra,* at 617; *Meek v. Pittenger,* 421 U. S. 349, 366 (1975).

The district court, thus viewing the employment relationship in the Christian school as only "remotely connected to the exercise of religion", states that the Supreme Court, in its *Murdock*[21] and *Follet*[22] decisions did not intend that such activity would be "constitutionally immunized from taxation" (J. S. App. 62a). Those decisions the court misapplies. They stand as bedrock decisions against the taxation of religious activity. Thus they support the position of the religious parties before the Court whose activity, in the form of the employment relationship, is the religious keystone of their enterprises. There can be no doubt that, whether unconstitutionally or not, the unemployment compensation tax burdens an activity which is undeniably religious.

### B. The Tax Unconstitutionally Burdens Religious Free Exercise.

The district court states: "In short, the injury to Free Exercise rights asserted by plaintiffs ultimately comes down to the financial burden imposed by the extension of the unemployment compensation tax to these schools" (J. S. App. 60a-61a). The court held the imposing of the tax to be constitutionally inoffensive because, so the court believed, the tax burden was not "signifi-

20. See *Lemon v. Kurtzman,* 403 U. S. 602 (1971).

21. *Murdock v. Pennsylvania,* 319 U. S. 105 (1943).

22. *Follett v. McCormick,* 321 U. S. 573 (1944).

cantly" heavy. Here the court mistakenly relied, for its legal conclusion, upon dictum of the Supreme Court in *Braunfeld v. Brown*, 366 U. S. 599 (1961) and, for its factual conclusion, upon "the record as a whole". In both of its conclusions the court erred.

The dictum from *Braunfeld* in no sense sustains a principle that government may tax religious activities or enterprises if the only effect of the tax is to render these (in the words of the district court) "somewhat more expensive". Obviously, to render any activity "more expensive" may retard that activity. *Braunfeld* involved a state's Sunday closing law challenged by Orthodox Jewish merchants under the Free Exercise Clause. The law barred them from selling on Sunday, while their religion barred them from selling on Saturday. The combined effect was potentially to reduce their personal incomes. No tax was involved, and no imposition directly upon a religious activity, practice or relationship. The closing law did not bar, refer to, or in any way deal with the Orthodox Jewish Sabbath or services. Nor did it deal with religious observance on Sundays. It simply regulated secular activity on the latter days. Hence the Court was able to characterize the law's effect on the Orthodox Jewish merchants as "indirect". *Id.* at 607.[23] This is radically different from the situation at bar where not only is a tax involved but that tax is imposed directly on a critically important aspect of the religious enterprise.

The district court's employment of the *Braunfeld* dictum in the premises calls for this Court's correction because the principle is erroneous and dangerous, that the dollar-amount *smallness* of a tax on religion absolves that tax from unconstitutionality. Certainly in Establishment Clause cases the Supreme Court has most carefully stressed that the dollar-amount smallness of an exaction of pub-

23. But see concurring opinion of Justice Stewart in *Sherbert v. Verner*, 374 U. S. 368, 418 (1963) in which he concluded that *Braunfeld* cannot stand consistently with *Sherbert* and argued that "the *Braunfeld* case was wrongly decided and should be overruled."

lic funds for religious purposes does not relieve the exaction of unconstitutionality. *Committee For Public Education v. Nyquist*, 413 U. S. 756, 787 (1973). And see Justice Black's famous discussion in *Everson v. Board of Education*, 330 U. S. 1, 16 (1947), that the Establishment Clause means, at least, that "No tax, *in any amount, large or small*," for religious purposes may be valid. (Emphasis supplied). Madison's remark, in his *Memorial and Remonstrance* about "three pence"[24] has been cited with approbation by this Court. See *Flast v. Cohen*, 392 U. S. 83, 103 (1968). The same reasoning would appear essential in free exercise situations where government claims it may tax religion provided that the tax is merely small ("incidental"). If religion can be taxed a little, why not greatly? And if religion can be taxed a little with one tax, why not a little again with another tax—and still again other "small" taxes?[25]

The trial record herein does indeed show uncontradicted testimony of religious plaintiffs below that the unemployment tax would have heavy impact upon them (J. A. 96-98). The schools in question refuse, upon Scriptural grounds, to accept *any* local, state or federal programs of

24. ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 WRITINGS OF JAMES MADISON, 183, 186 (Hunt ed. 1901).

25. The district court attempts to minimize the impact of the unemployment tax by stating that a nonprofit employer is free to elect the reimbursement method of contribution (J. S. App. 63a). That, and the fact that the tax is thus different from the taxes seen in *Murdock* and *Follett*, the court offers as additional reasons for holding the unemployment tax inoffensive. But regardless of the "reimbursement" option, both the tax and the entire program would be imposed. And the fact that this tax differs from the taxes examined in *Murdock* and *Follett* is irrelevant. The Supreme Court has never indulged the apparent presumption of the district court—namely, to hold that the taxes invalidated in those cases exhausted the list of all possible unconstitutional taxes.

aid. They depend solely upon the voluntary contributions of their faith communities (J. A. 96-97). Although teachers are paid minimum wages, much of the instruction is also supplemented by aides who volunteer their time (J. A. 94). It is obvious that, in a day of growing personal taxation and inflation, *no* tax burden upon the enterprise may be dismissed as "incidental" or "small."

Further, the tax is exacted as a necessary condition to the pursuit of the religious employment relationship, because failure to pay the tax, and failure to undertake and pay for the administration of the tax program within the religious institution, results in the imposition of damaging, and ultimately crippling, penalties upon the institution. See, for example, California Unemployment Insurance Code Sections 1126 (10% penalty), 1129 (interest), 1135 (delinquent assessments), 1137 (jeopardy assessment), 1755 (levy), 1785 (warrant for enforcement of liens), and 1787 (expenses of levying and execution of warrant). The Court should also note that in addition to penalties against the institution, the persons in control of the institutions' funds who refuse to pay the amounts "due" are personally liable for such amounts (Section 1757), and are subject to criminal penalties for nonpayment (Section 2108—nonpayment, a misdemeanor). Of course, even failing to submit "required" reports can result in a criminal conviction (Sections 2106, 2109 and 2112).

Moreover, the challenged program would extract from a religious body its religiously entrusted funds, which are devoted entirely to religious purposes, and require their transfer to governmentally determined secular uses. See *Walz v. Tax Commission*, 397 U. S. 664, 675 (1970), and note Justice Brennan's concurrence at 692.

The district court's opinion omits any discussion of other specific claims which the religious parties have made under the Free Exercise Clause in their complaint. Each of these claims was supported by substantial evidence. For example:

*Governmental conditioning of employment relationships, within religious institutions.* The testimony of Government witnesses showed that it is a national practice under the Act to plunge boldly into religious issues (J. A. 117-124, 132-148, 174-185). This necessarily chills the exercise of religious liberty within the religious body, it being known that the propriety of every discharge is subject to review by government (though if the governmental body would decline to consider religious reasons for the discharge, an equally oppressive burden would be placed upon the institution's liberty to govern its ministry).

*Imposition upon the right to pursue a religious vocation.* The Supreme Court has noted that "the church-teacher relationship in a church-operated school differs from the relationship in a public or other non-religious school". *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 504 (1979). The teachers in the present case are unquestionably pursuing a ministry, apostolate, or religious vocation. (T. 104-113). And see *McDaniel v. Paty*, 435 U. S. 618, 626 (1978). Testimony was presented that their settled belief in the providence of God causes them to reject a substituted governmental providence. (T. 109-111).

*Injury to religious rights of parents.* The trial record shows that the free exercise rights of parents are threatened by the imposition of the program. Parent plaintiffs testified that they are a prime source of the schools' funding and that the unemployment tax imposes on their schools an additional cost for a program unrelated to Christian education. They also believe that the program would lead to the presence of religiously undesirable teachers in the school (T. 115).

### C. Imposition of the Tax Is Not Justified by a Compelling State Interest.

The district court, on the question of compelling state interest, holds that the tax scheme "meets the *Braunfeld* criteria for validity under the Free Exercise Clause"

(J. S. App. 64a). While, as noted *supra*, it is quite possible that *Braunfeld* may now be read as inconsistent with the test set forth in *Sherbert*, it is in any event clear that no state interest is here present which would jusify the subordination of the free exercise claims advanced. The district court, devoting but a half page (J. S. App. 65a) to discussion of compelling state interest, points to nothing in the record to substantiate its broad claim that the imposition of the tax program on the religious ministries in question is necessitated if the adverse effects of unemployment nationally are to be diminished through the operation of FUTA.

In *Sherbert* the State countered the religious claimant's demand for unemployment compensation benefits with an assertion, comparable to that of the district court here, that the integrity of the unemployment compensation program would be harmed were the religious claim to be recognized and that, therefore, a compelling state interest justified denial of the claim. *Sherbert, supra*, at 407. Neither there, nor here, does "the record appear to sustain [the government's contention]." *Ibid.* The Court in *Sherbert* compared that case with the facts of *Braunfeld*, noting that, in the latter, the requiring of exemptions for Sabbatarians would have presented "an administrative program of such magnitude, and afforded the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable". *Id.* at 408-409. No comparable factors appear in the present case.

The Court in *Sherbert*, also held it incumbent upon the State "to demonstrate that no alternative forms of regulation would combat such abuses [the alleged threats to the integrity of the unemployment compensation program] without infringing First Amendment rights". *Id.* at 407. In the present case neither the Government nor the district court has offered such demonstration. Plainly none could be offered. Just as in *Murdock, supra*, it is clear that the governmental interests which the tax is de-

signed to support will be realized without imposing the tax on the religious activity in question.

## IV. Imposition of the Federal-State Unemployment Tax Program Upon Pervasively Religious Schools Which, Though Not Operated by Churches, Are Indistinguishable in Character From Them in Religious Character and Mission, Violates Rights Guaranteed Such Schools by the Equal Protection Clause of the Fourteenth Amendment.

The district court well stated the equal protection claim of the non-church-affiliated fundamentalist school plaintiffs:

> Essentially, they argue that the exemption scheme embodied in 26 U. S. C. § 3309(b)(1)(A) and (B) and Cal. Unempl. Ins. Code § 634.5(a)(1) and (2) arbitrarily discriminates against religious schools without church affiliation and in favor of religious schools controlled and operated, directly or indirectly, by the institutionalized religious sects or denominations. The discrimination arises from the fact that the statutes under consideration, when construed according to their plain meaning, impose the financial burden of the unemployment compensation tax upon the independent religious schools while exempting the church-affiliated schools. The Grace Brethren plaintiffs argue that this disparate treatment of church-affiliated and non-church-affiliated schools is a violation of the Equal Protection Clause. (J. S. App. 75a)

The district court found it not necessary to reach the merits of the plaintiffs' equal protection argument in view of its determination that application of the unemployment compensation scheme to employees of the non-church schools would involve "impermissible entanglement of the state with religion." (J. S. App. 76a). The court, however, correctly reasoned that, "[b]y classifying schools according to formal church affiliation, rather than religious

mission and curriculum content, and by subjecting non-church-affiliated schools to a financial burden from which church-affiliated schools are exempt, Congress and the California legislature have accorded differential treatment to religious organizations which may well have equal status under the First Amendment." (*Ibid.*)

The federal parties argue that a rational basis exists for distinguishing the church-affiliated schools from the religious schools here considered and that indeed "even these [non-church schools] with a strong religious orientation, should be treated like secular schools . . ." (Brief for the United States, 38). But the United States must demonstrate more than a mere "rational basis" for discriminating among pervasively religious institutions which are exercising fundamental First Amendment freedoms. Instead, statutory classifications treating such institutions disparately are subject to strict judicial scrutiny. *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, 34 n. 75 (1973), *Carey v. Brown*, 447 U. S. 455, 462 (1980).

Nonetheless, not even the United States, claimed rational basis can be demonstrated. The United States makes four assertions, none of which are supportable:

> (1) That church-run schools "are more likely to have a strong and specific religious orientation than interdenominational schools or those established and run by the laity."[26] (*Ibid.*) This is the merest

26. As the Second Circuit stated in a case wherein a governmental agency claimed that legal affiliation with a church is determinative of the religious character of a school:

> "It is the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion Clauses and not the vesting of legal title or the responsibility of operation." *NLRB v. Bishop Ford Central Catholic High School*, 623 F. 2d 818, 823 (2d Cir. 1980), *cert. denied*, 450 U. S. 996 (1981).

speculation, completely contradicted by the extensive record herein (J. A. 71-77, 82-188). A more strong and specific religious orientation could scarcely be imagined than that obtaining in Redwood Christian Schools.

(2) That "the risk of church-political entanglement is greater when church-controlled schools are involved." (*Ibid.*) This is guesswork; political entanglement appears confined to situations where religious groups (not necessarily a church) seek subsidy. *Lemon v. Kurtzman, supra,* at 622-623. How the "political entanglement" assertion is relevant is not clear.

(3) That "there is a greater likelihood that employees of church-controlled schools will be provided with non-governmental assistance, through church relief programs, for economic hardship caused by unemployment." (*Id.* at 39). This, again, is simply speculation completely without record support and not responsive to any constitutional claim raised by the Christian schools in question.

(4) That "the distinction is practical to administer." While neither the State nor the federal government introduced evidence to support that conclusion, the point is irrelevant. First, administrative convenience may not be held to outweigh the enjoyment of First Amendment liberties. Second, the pervasively religious nature of Redwood Christian Schools is already established as of record in this case. Nor is any constitutional problem occasioned in the determination of whether a non-church religious school is really "religious." Under many familiar laws (*e.g.*, § 501(c)(3) of the Internal Revenue Code), determinations are routinely made that organizations are "religious in purpose. Indeed, the "Category II" schools, in order to be exempt under 26 U. S. C. § 3309(b)(1)(B) must be found to be operated for "religious

purposes'' *and* be operated, etc. by a church or convention or association of churches. The simple inquiry needed therefor does not involve inquiry into matters of doctrine.

Equally unfounded is the State's contention that the non-church religious schools should be regarded as secular under the statute, since otherwise there will be necessitated ''inquiry into the merits of the particular religious doctrines'' of such schools. (California Amended Brief, 32). No inquiry as to the merits, or lack thereof, of religious doctrine is involved in the identifying of any school as religious.

## CONCLUSION

For all of the foregoing reasons it is respectfully submitted that this Court should affirm the judgment of the district court in Nos. 81-31 and 81-228 and reverse the judgment of the district court in No. 81-455.

Respectfully submitted,

William Bentley Ball
Philip J. Mubren
Kathleen A. O'Malley
Ball & Skelly
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

Eric Nelson Lindquist
Robert L. Toms
Lisa A. Runquist
Caldwell & Toms
611 West Sixth Street
Los Angeles, CA 90017
(213) 628-1300

*Attorneys for Grace Brethren Church, et al. as Appellees in No. 81-31 and 81-228 and as Cross-Appellants in No. 81-455*